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NO. 87-1548

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

DANNIE RAY PREWITT,

Petitioner

versus

COMMONWEALTH OF KENTUCKY,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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33pp

QUESTION PRESENTED

WHETHER A CRIMINAL DEFENDANT'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES IS VIOLATED WHEN THE POLICE, ACTING ON A TIP FROM A RELIABLE INFORMANT, STOP THE DEFENDANT'S AUTOMOBILE ON THE REASONABLE BELIEF THAT DRUGS ARE CONTAINED THEREIN AND CONDUCTS A WARRANTLESS SEARCH?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Respondent, the Commonwealth of Kentucky, respectfully urges the Court to deny certiorari for the following reasons.

OPINION BELOW

The unreported opinions of the Supreme Court of Kentucky are reproduced herein as an appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is the Fourth Amendment to the United States Constitution.

COUNTERSTATEMENT OF THE CASE

The material facts in this case are as follows:

On May 10, 1986, at approximately 1:00 p.m., Officer Michael Starnes of the Northern Kentucky Drug Enforcement Unit received a call from a confidential informant. The informant stated that petitioner would be going to the residence of Jimmy Holt in Florence, Kentucky, to pick up some Quaaludes. The informant told Officer Starnes that Holt had just gotten back in town with 10,000 Quaaludes and that petitioner was on his way out or going out sometime that afternoon to pick some up (Transcript of Suppression Hearing on September 22, 1986, p. 15,

hereafter SH). The informant further identified the make and model of the automobile petitioner would be driving as a Lincoln Continental (Transcript of Recitation of Stipulation Facts August 8, 1986, p. 2, hereafter TSF).

Officer Starnes had worked with this informant during the entire six years he had been on the force (TSF 8/8/86, p. 2). Officer Starnes believed the informant to be reliable (SH 1/22/86, p. 5). The informant had provided reliable information in the past which had led to the arrest and conviction of individuals involved in drug trafficking (TSF 8/8/86, p. 2).

After getting the information from the informant, Officer Starnes called his supervisor, Officer Hal Spaw, Director of the Northern Kentucky Drug Enforcement Unit (TSF 8/8/86, p. 2 and Transcript of Evidence 10/7/86, p. 14, 28, hereafter TE). Officer Spaw then went to the address where petitioner was living to set up surveillance and to determine if petitioner would in fact be leaving as the informant had stated (TSF 8/8/86, p. 3). Approximately three hours

later, petitioner came out of his house and left in his automobile. Officer Spaw recognized the petitioner and his car (TE 10/7/86, p. 30).

Petitioner was followed to the Holt residence in Florence, Kentucky. At this point police were able to again confirm the information given them by the informant. Petitioner spent at least 10 minutes, but no more than 20 minutes, in the Holt residence (TE 10/7/86, p. 16, 33). Petitioner then returned to his car and left (TSF 8/8/86, p. 3). Petitioner was stopped by a marked cruiser and officers conducted a pat-down search believing petitioner to be armed with a gun (TSF 8/8/86, p. 4 and TE 10/7/86, p. 22). While Officer Starnes was questioning petitioner outside his vehicle, Officer Spaw opened the passenger door and saw a brown paper bag sticking from under the front passenger seat (TE 10/7/86, p. 46-47). Officer Spaw removed the bag and upon opening it discovered three plastic baggies containing 100 Quaaludes each (TE 10/7/86, pp. 19, 35, 48). Later examination by a laboratory chemist revealed the pill quantity to be 300; 200 of which

contained methaqualone and 100 contained diazepam (TSF 8/8/86, p. 4 and TE 10/7/86, p. 59).

On June 27, 1986, a Kenton County, Kentucky, Grand Jury returned an indictment charging petitioner with possession of a counterfeit substance (300 counterfeit Quaaludes) and as a persistent felony offender in the first degree (Transcript of Record, hereafter TR 5).

Prior to trial, petitioner moved to suppress the evidence taken from his vehicle on May 10, 1986. The evidence consisted of 300 tablets (Quaaludes) found in a brown paper bag in the passenger compartment of petitioner's automobile. In support of the suppression motion, petitioner alleged the search was conducted without a search warrant or any exigent circumstances (TR 15). The trial court overruled petitioner's motion to suppress the evidence (TR 40-41).

Petitioner's trial by jury was held on October 7, 1986. Petitioner was found guilty of Possession of a Counterfeit Substance. He was sentenced to five (5) years in the state

penitentiary and a fine of $5,000.00. The petitioner was also found guilty of being a persistent felony offender in the first degree. For this conviction, he was sentenced to twenty (20) years in the state penitentiary and a fine of $5,000.00 (TR 64-67).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

THE WARRANTLESS SEARCH OF PETITIONER'S AUTOMOBILE DID NOT VIOLATE THE FOURTH AMENDMENT AND COMPLIED WITH THE "BRIGHT LINE" PRINCIPLES ANNOUNCED IN UNITED STATES V. ROSS, 456 U.S. 798 (1982).

United States v. Ross, 456 U.S. 798 (1982) is dispositive of the issue because it clearly sets forth the standard for warrantless searches of motor vehicles based on probable cause under the "automobile exception." In Ross, this Court held that police who have probable cause to believe an automobile contains contraband may conduct a warrantless search of the entire vehicle, including all compartments and containers found therein. 456 U.S. at 823. Ross extends the holding in Carroll v. United States, 267 U.S. 132

(1925)[1] by defining the scope of the search under the automobile exception. The holding in Ross has been reaffirmed in California v. Carney, 471 U.S. 386 (1985). Carney upheld the warrantless search of a mobile home because police had probable cause to believe the defendant was distributing a controlled substance from the vehicle. 471 U.S. at 390-95. See also United States v. Johns, 469 U.S. 478 (1985). (upholding warrantless search of packages three days after removal from a truck because police had probable cause to believe the truck contained contraband).

A.

Based on the totality of the circumstances in this case, a search warrant for petitioner's automobile could not have been issued before the informant's tip had been corroborated.

The facts in the present case indicate that the confidential informant disclosed the following information to the investigative officer:

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[1]Carroll held that under the Fourth Amendment a warrant was not needed to search an automobile stopped by police who had probable cause to believe the automobile contained contraband. 267 U.S. at 153.

(1) Names of specific individuals involved in the transaction, e.g. Dannie Ray Prewitt and Jimmy Holt (SH 8/22/86, p. 5).

(2) Named specific location where drug transaction would occur, e.g., the Holt residence, Florence, Kentucky (TSF 8/8/86, p. 2).

(3) A description of the vehicle petitioner would be driving, e.g., Lincoln Continental (SH 9/22/86, p. 4).

(4) The approximate time petitioner would leave his house (TSF 8/8/86, p. 2-3).

(5) Specific information as to type of drug to be transacted, e.g., quaaludes (SH 9/22/86, p. 5 and TSF 8/8/86, p. 23).

(6) Name of individual who would supply drugs, e.g. Timothy Holt plus the additional information that he'd just gotten back in town with 10,000 quaaludes (SH 9/22/86, p. 5).

Given these specifics, petitioner contends that probable cause existed for the issuance of a search warrant of his automobile when the tip was first received. See the petition at pp. 16-17.

"The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity'

and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). Moreover, the standard for review of an issuing magistrate's probable cause determination is whether there existed a "substantial basis" for concluding that a search would uncover evidence of wrong doing. 462 U.S. at 236. In view of the "substantial basis" requirement, a magistrate could not have concluded that petitioner's automobile contained drugs when petitioner had not yet visited the Holt residence and engaged in the anticipated drug transaction. In short, petitioner's ten (10) to twenty (20) minute stay at the Holt residence and subsequent exit in his automobile gave rise to the type of "probabilities" upon which a magistrate would issue a search warrant. The probable cause determination must be based on objective facts and not merely on the subjective good faith of the police officers. See Ross, 456 U.S. at 808. Thus the issuance of a search warrant is unnecessary

when the police have verified every facet of the information given to them by the confidential informant. After corroborating the tip, police would have reason to believe the remaining unverified bit of information -- that the accused has drugs in his automobile -- is likewise true. See 462 U.S. at 243. The corroboration of petitioner's conduct (going and leaving the Holt residence), "reduced the chances of a reckless or prevaricating tale." See 462 U.S. at 244-245. The corroboration of the tip provided the necessary probabilities for the warrantless search of petitioner's automobile. See 462 U.S. at 246.

B.

A warrant was not required to search petitioner's automobile after it had been legitimately stopped and there was reason to believe contraband was contained therein.

In Ross, like the case at bar, police had received information from a reliable informant. The informant gave the police a description of the defendant and his car, told them that at a specific location the defendant had completed a drug sale and that he had narcotics in the trunk

of his car. The police drove to the location and stopped the car when they realized the driver matched the informant's description. After the defendant was arrested, police opened the trunk and found a closed paper bag. Upon opening the bag they discovered glassine bags containing heroin. A more thorough search of the car was later completed at the police station where police discovered a red leather pouch containing $3,200 in cash. No warrant had been obtained for the search of the automobile. 267 U.S. at 800-801.

This Court opined that Congress had always recognized the impracticability of having to get a warrant in cases involving transportation of contraband. In a footnote this Court stated:

> individuals always have been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts.

456 U.S. at 806, n.8.

The exception to the warrant requirement established in Carroll only applies to searches of

vehicles supported by probable cause. 456 U.S. at 809. Thus, a search is reasonable if it is based on facts that would justify the issuance of a warrant even though one had not been obtained. There was no real difference between holding a car while presenting the probable cause issue to a magistrate to obtain a warrant and carrying out an immediate search without a warrant, provided there was probable cause. 456 U.S. at 809.

Once police have probable cause to search an automobile they may "conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant particularly describing the place to be searched." 456 U.S. at 800.

Additionally, this Court opined that the scope of the search under the automobile exception is not defined by the container but is "defined by the object of the search and the places in which there is probable cause to believe it may be found." 456 U.S. at 824. The Ross Court distinguishes United States v. Chadwick, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979) by explaining that in those cases the

police only had probable cause to believe that specific containers concealed contraband. 456 U.S. at 810-14. In the present case, as in Ross, probable cause applies to the entire automobile. The police had probable cause to believe that contraband was contained somewhere in petitioner's automobile.

As the Court concluded in Ross, when police have legitimately stopped a vehicle and have probable cause to believe contraband is concealed within the vehicle, they may conduct a warrantless search. 456 U.S. at 800. The search may be of every part of the vehicle including containers within the vehicle that may conceal the object of the search. 456 U.S. at 818. Without doubt, the case at bar falls within the holding of Ross, and thus the petition for writ of certiorari should be denied.

C.

The status of exigent circumstances with respect to a warrantless search of an automobile where the police have probable cause to believe contraband is contained therein.

Exigent circumstances are not a necessary predicate for a warrantless search of an automobile where police have probable cause to believe that contraband is contained therein.

In the present case, the Supreme Court of Kentucky issued two written unpublished opinions (Appendix herein, A1-8). In the original opinion the Kentucky court upheld the warrantless search of petitioner's automobile solely on the basis that the police had probable cause to conduct the search (A3). Furthermore, the Court rejected petitioner's argument that "in the absence of probable cause and exigent circumstances police were required to obtain a search warrant. . . ." (A2-3). [Emphasis added]. The Court's holding was based on Estep v. Commonwealth, Ky., 663 S.W.2d 213 (1983) (A3). In Estep, Kentucky adopted the holding of Ross, supra. Consequently, the Estep court applied the "bright line" principles of Ross and found "[n]o violation of Section 10 of the Kentucky Constitution or of Amendment IV of the United States Constitution." 663 S.W.2d at 215-216.

Approximately two and one-half months after the original opinion had been issued, the Supreme

Court of Kentucky issued a modified opinion (A5-8). In this opinion, the Court once again and held that probable cause existed for the warrantless search (A5-6). However, the Court further concluded, ". . . there was not sufficient time to secure a warrant, and so an exigent circumstance existed." (A6-7).

It is apparent from the modified opinion that the Kentucky court's analysis considered the impact of "probable cause" and "exigent circumstances" upon the warrantless search of petitioner's automobile. Moreover, it appears that the Court's modified holding impliedly relies upon Estep, which was based partly upon whether the warrantless search violated Section 10 of the Kentucky Constitution. Because Estep is rooted in part on an interpretation of a State constitution, the respondent submits that the Kentucky Supreme Court could apply a stricter standard for a warrantless search than announced in Ross.

In Johns, supra, this Court has held that "A vehicle lawfully in police custody may be

searched on the basis of probable cause to believe that it contains contraband, and there is no requirement of exigent circumstances to justify such a warrantless search." 469 U.S. at 484; See also Florida v. Meyers, 466 U.S. 380 (1984) (per curiam). There have been diverse opinions among the Federal Circuit Courts with respect to whether an exigent circumstance analysis should be engaged.[2]

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[2](PROBABLE CAUSE ANALYSIS ONLY:) United States v. Moscatiello, 771 F.2d 589 (1st Cir. 1985); United States v. Roy, 734 F.2d 108 (2nd Cir. 1984) cert. denied 106 S.Ct. 1520 (1986); United States v. Schecter, 717 F.2d 864 (3rd Cir. 1983); United States v. $29,000-U.S. Currency, 745 F.2d 853 (4th Cir. 1984); United States v. Mendoza, 722 F.2d 96 (5th Cir. 1983); United States v.Burnett, 791 F.2d 64 (6th Cir. 1986); U.S. v. Tate, 821 F.2d 1328 (8th Cir. 1987); United States v. Corral-Villavicencio, 753 F.2d 785 (9th Cir. 1985); United States v. Esle, 743 F.2d 1465 (11th Cir. 1984).

(PROBABLE CAUSE AND EXIGENT CIRCUMSTANCE ANALYSIS ONLY:) United States v. Reyes, 792 F.2d 536 (5th Cir.) cert. denied 107 S.Ct. 191 (1986); United States v. Hepperle, 810 F.2d 836 (8th Cir.) cert. denied 107 S.Ct. 3274 (1987); United States v. Bain, 736 F.2d 1480 (11th Cir.) cert. denied 469 U.S. 937 (1984); See also United States v. Williams, 822 F.2d 1174 (D.C. Cir. 1987) (distinguishes between whether police had probable cause to believe the contraband was in a specific container or just somewhere in the auto but did not know where).

Even though some of these circuits interpret Ross differently, they apply the same type of fundamental Fourth Amendment analysis found in Ross.

CONCLUSION

Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As a member of the Bar of the United States Supreme Court, the undersigned hereby certifies that on the 11th day of May, 1988, three copies of the foregoing Response to Petition for Writ of Certiorari were mailed first class, postage prepaid, to Honorable Jim M. Alexander, Security Trust Building, 312, Lexington, Kentucky 40507, Counsel for Petitioner.

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NO. 87-1548

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PETITIONER

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APPENDIX TO
RESPONSE FOR WRIT OF CERTIORARI

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RENDERED: NOVEMBER 5, 1987
(NOT TO BE PUBLISHED)

SUPREME COURT OF KENTUCKY

87-SC-178-TRG
(86-CA-2690-MR)

DANNIE RAY PREWITT APPELLANT

V.

KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
#86-CR-145

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant was convicted in Kenton Circuit Court of possession of a counterfeit substance and of being a first-degree persistent felony offender. He was sentenced to a term of twenty years and ordered to pay a $5,000 fine.

The conviction for possession of a counterfeit substance was based on discovery of a large quantity of tablets in appellant's automobile, which had been stopped by police acting on a tip from a confidential informant.

Appellant raises three alleged errors on appeal. First, appellant contends that the trial court erred in failing to require disclosure of the identity of the confidential informant. This issue was not properly preserved for appellate review since appellant failed to directly request the trial court to order such disclosure either before or during the trial, or to even question officers at trial on the subject. However, even if appellant's references to the reliability of the undisclosed informant were sufficient to preserve this issue, disclosure would not be required under the circumstances of this case, as the informant was neither a participant in the crime nor relevant to the preparation of appellant's defense. Schooley v. Commonwealth, Ky., 627 S.W.2d 576 (1982).

Appellant next asserts that the trial court erred in failing to suppress the tablets as the fruit of an illegal search of his automobile. He contends that in the absence of probable cause and exigent circumstances police were constitutionally required to obtain a search

warrant before looking under the seat for the bag containing the tablets. We disagree. In Estep v. Commonwealth, Ky., 663 S.W.2d 213 (1983), we held that where probable cause exists to stop a vehicle and to believe that contraband is contained therein, police may conduct a warrantless search of the vehicle and the contents thereof. There is no question that probable cause exists under circumstances where, acting on a specific tip from a previously reliable informant that appellant will pick up contraband from a named supplier, police observed appellant drive to the home of the alleged supplier and drive off a few minutes later.

Finally, appellant argues that the trial court erred in denying him a new trial based on testimony from his fiancee that she overheard a juror say after the trial that appellant should be put in isolation with the key thrown away and that the juror thought he "knew that name from somewhere." This testimony concerning a casual remark is insufficient evidence of juror bias to support a finding that the defendant was denied a

fair trial. RCr 10.02; Combs v. Commonwealth, Ky. App., 356 S.W.2d 761 (1962).

The judgment of the Kenton Circuit court is affirmed.

All concur.

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RENDERED: NOVEMBER 5, 1987
(NOT TO BE PUBLISHED)
AS MODIFIED: JANUARY 21, 1988

SUPREME COURT OF KENTUCKY

87-SC-178-TRG
(86-CA-2690-MR)

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AFFIRMING

Appellant was convicted in Kenton Circuit Court of possession of a counterfeit substance and of being a first-degree persistent felony offender. He was sentenced to a term of twenty years and ordered to pay a $5,000 fine.

The conviction for possession of a counterfeit therein, police may conduct a warrantless search of the vehicle and the contents thereof. There is no question that probable cause

exists under circumstances where, acting on a specific tip from a previously reliable informant that appellant will pick up contraband from a named supplier, police observed appellant drive to the home of the alleged supplier and drive off a few minutes later.

The officers received a tip at 1:00 p.m. that appellant would be going to the residence of Mr. Holt to pick up some controlled substance. The officer set up a surveillance at appellant's home and also at Holt's home. Nothing occurred until 5:30 p.m. when the officer watching appellant's home called the officer watching Holt's home to tell him that appellant was leaving his residence. Appellant's car approached Holt's house at approximately 6:00 p.m., and appellant went inside. He left at approximately 6:15 p.m., and was stopped. The officers did not have sufficient evidence to secure a search warrant until after the appellant had visited the Holt residence, which confirmed the accuracy of the tip. He left shortly thereafter, and there was

not sufficient time to secure a warrant, and so an exigent circumstance existed.

Finally, appellant argues that the trial court erred in denying him a new trial based on testimony from his fiancee that she overheard a juror say after the trial that appellant should be put in isolation with the key thrown away and that the juror thought he "knew that name from somewhere." This testimony concerning a casual remark is insufficient evidence of juror bias to support a finding that the defendant was denied a fair trial. RCr 10.01; Combs v. Commonwealth, Ky. App., 356 S.W.2d 761 (1962).

The judgment of the Kenton Circuit Court is affirmed.

All concur.

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